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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
ERIC W. HAGEN
KIRKLAND & ELLIS LLP
777 South Figueroa Street
34th Floor
Los Angeles, CA 90017
(213) 680-8400

Attorneys for Petitioners

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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OPINIONS BELOW

The orders of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting petitioners' summary judgment motion are reprinted at Pet. App. 23a-44a and are reported at 2003 WL 25274689 and 2003 U.S. Dist. LEXIS 27270. The Ninth Circuit's decision reversing the district court is reprinted at Pet. App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Pet. App. 45a-46a and is not otherwise published.

JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy extended the time to file a petition for a writ of certiorari to and including August 28, 2006. The petition for a writ of certiorari was filed on August 28, 2006, and was granted on December 1, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at Pet. App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a, states, in pertinent part:

> The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5850, reprinted at Pet. App. 58a, states, in pertinent part:

> Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

STATEMENT OF THE CASE

A. Factual Background

1. January 24, 2002 marked the first time in Olympic history that the Olympic Torch Relay visited Alaska. Charles Bingham, *The Olympic Torch Relay comes to Juneau*, Juneau Empire, Jan. 16, 2004, available at http://juneauempire.com/stories/011602/spo_juneaurelay.shtml. In preparation, a local task force of approximately two dozen local civic leaders planned for Juneau's participation in the

international event—a ten-mile relay through Juneau. *Id.* Members of the city government, including the mayor's office and the Juneau Department of Parks and Recreation, lent their support. *Id.* Local businesses, as well as national sponsors of the torch relay, supported the event. *Id.* The torch ceremony involved a week of community festivities. *A weeklong celebration of the Olympic spirit*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_calendar.shtml. Upon its arrival in Juneau, the Olympic flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and carried through several miles of Juneau's streets, including past the State Capitol and the Juneau-Douglas High School. *The torch's route through Juneau has 3 segments*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_torchroute.shtml.

Believing that the Olympic Torch Relay had noteworthy educational value (as well as high significance to the community), the Juneau School District allowed students to observe and participate in the ceremony. Pet. App. 34a. In addition, the School District allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. Pet. App. 63a.

After classes convened on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed on Glacier Avenue in front of the school. Pet. App. 24a-25a, 34a. Once outside the classroom, the students were allowed to be in only one place—in front of the school, either on campus or lined along either side of the street. J.A. 23-24, 47-56. At all times, the student body remained under the supervision of high school administrators, teachers, and staff. *Id.*

During the event, high school cheerleaders were out in uniform to greet the torchbearers. Pet. App. 34a. The high

school pep band played. *Id.* Four high school students, representing various segments of the student body, acted as torchbearers. J.A. 23. In that role, the student torchbearers carried the Olympic flame as a small part of the 11,500-person chain of torchbearers who transported the torch along the 65-day, 46-State, 13,500-mile relay route. Bingham, *supra.*

2. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus to await the torch relay. Pet. App. 25a. Before the torch arrived, Principal Deborah Morse approached this group to investigate the throwing of snowballs and beverage bottles that originated from their vicinity. J.A. 24, 41, 43. As the torchbearers and television camera crews approached, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HiTS 4 JESUS." Pet. App. 25a. Frederick's banner—which measured (by his estimation) 14 feet long—was clearly visible to the large number of students assembled on campus. J.A. 24; Pet. App. 70a; Opp'n to Pet. at 1 n.1.[1]

a. "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. J.A. 24, 59-60, 117. A "bong hit" is slang for inhaling marijuana from such a device. Pet. App. 4a; J.A. 24, 60-61. The term "bong hits" is widely understood by high school students (and others) as referring to smoking marijuana. Pet. App. 38a, 61a-62a; J.A. 24, 60-61. Frederick himself testified that "[m]any people

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[1] At the certiorari stage, respondent attempted to recast the banner incident as involving himself and several non-students. *See* Opp'n to Pet. at 11 (stating he was "joined with non-students to display a banner"). The record evidence identified only one non-student who may have been involved in the incident. Pet. App. 70a; J.A. 29, 35, 36.

reference [the phrase 'bong hits'] to drugs." J.A. 63. He also conceded that he "knew it was a possibility" that people would "interpret . . . bong hits as related to drugs" and that "there is a general amount of people who can understand the meaning of it [as a drug reference]." J.A. 61, 64. The combination of the phrases "bong hits" and "4 Jesus," according to Frederick, was intended to be a publicity stunt—something "controversial and yet ultimately meaningless." J.A. 66-67. "Christian people," he explained, "I believe they are anti-drugs, so if you put that together, it's somewhat ironic." J.A. 67. He further acknowledged that "some people might have taken offense." J.A. 63.

b. Prior to displaying the banner, Frederick had been absent from school. Pet. App. 25a. Having skipped his first class of the day, Frederick later claimed that his car was stuck in the snow. Pet. App. 64a. Frederick neither called the school to report his absence, nor informed the office of his presence when he arrived. *Id.*; J.A. 72-73. Frederick made no secret of the fact that, in positioning himself near the school to await the relay, he was purposely avoiding going onto school grounds. J.A. 28-29, 73. Although he could have selected any number of locations to unfurl his banner along the Olympic Torch's ten-mile journey through Juneau, Frederick chose instead to position himself in front of the student body and to display the banner where it would be in full view of the assembled students.

c. Spotting the drug-related display, Principal Morse approached Frederick and his friends and asked them to drop the banner. Pet. App. 25a. While other students complied with the request, Frederick refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the banner because he was not physically on campus. J.A. 24-25. Principal Morse responded that Frederick was participating in a school activity and that the banner was inappropriate. Pet. App. 3a; J.A. 25. When Frederick

refused to put the banner down, Principal Morse began rolling it up and directed Frederick to accompany her to her office. Pet. App. 25a; J.A. 10, 16. Frederick let go of the banner and walked the other way. Pet. App. 25a.

Frederick did not meet with Principal Morse until he was later summoned out of class and escorted to her office. There, Ms. Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. Pet. App. 3a; J.A. 25. During the meeting, Frederick displayed a belligerent attitude and gave evasive and mocking answers to her questions. Pet. App. 65a. He told her, for example, that the banner was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." Pet. App. 61a; J.A. 25-26; S.E.R. 35.[2]

After discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple infractions, including refusal to respond to a staff directive, truancy/skipping class, defiance/ disruptive behavior, and refusal to cooperate/assist in investigation, in addition to the underlying charge of displaying the offensive banner. Pet. App. 59a, 66a-67a. Ms. Morse provided Frederick with a written Notification of Suspension, which listed the grounds for his punishment and advised him that he had the right to appeal. J.A. 106-07.

Following the banner episode, school personnel reported several incidents of pro-drug graffiti in the halls and on school grounds, including references to and mimicry of Frederick's banner. Pet. App. 2a; J.A. 43.

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[2] "S.E.R." refers to the Appellees' (Petitioners') Supplemental Excerpts of Record in the Ninth Circuit.

3. The student conduct rules enforced by Principal Morse are published in the school district policies and the student handbook. Pet. App. 52a-58a; J.A. 80-105. In its policies, the Juneau School Board explicitly recognizes that students have "constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly." Pet. App. 53a (Juneau Sch. Bd. Policy 5520). In that context, forbidden expressive conduct includes activities "that interfere[] with the orderly operation of the educational program," such as "any assembly or public expression that . . . advocates the use of substances that are illegal to minors." *Id.* Messages promoting illegal drugs, alcohol, and tobacco are likewise prohibited on student clothing and in student publications because such messages are "inconsistent with the district's educational mission and disruptive to the district's educational program." Pet. App. 52a, 56a.

These policies are consistent with federal law, namely 20 U.S.C. § 7114(d)(6), which requires school districts receiving federal funds through the vehicle of the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." The Juneau School District receives funds through this statutory mechanism and has complied with federal certification requirements. *See* S.E.R. 52-63. Indeed, the School Board promulgated a district-wide health and safety curriculum emphasizing the dangers of illegal drug and alcohol use. J.A. 80, 83-84. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. J.A. 84-96.

In addition, the Board policies more generally address disorderly and disruptive behavior. J.A. 81-83. Under the policies, Principal Morse was authorized "to take such means as may be reasonably necessary to control the disorderly

conduct of students in all situations and in all places where such students are within the jurisdiction of the school district." J.A. 96. Students are required, among other things, to "comply with the reasonable directives" of administrators and teachers when the students are under school authority. J.A. 82. The student handbook discipline plan enumerates infractions that may result in punishment, including all the infractions for which Frederick was suspended. J.A. 100-07.

These student conduct rules are not confined to activities in the classroom or on campus: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (defining infractions as including those committed "at school sponsored/sanctioned functions or activities").

The Board develops and periodically reviews these policies pursuant to a public, collaborative process that includes students, parents, teachers, and others responsible for student safety. J.A. 22, 98. In adopting standards for student behavior, the Board strives to "reflect community standards." J.A. 98.

B. Procedural History

1. Frederick appealed his suspension to Superintendent Gary Bader. Pet. App. 25a. Following a hearing in which Frederick was represented by counsel, Superintendent Bader issued a seven-page decision that upheld the principal's disciplinary actions. Pet. App. 59a-67a.

First, the superintendent concluded that Frederick violated the school policy against the display of offensive material. Pet. App. 63a. Specifically, Superintendent Bader determined that (i) Frederick was participating in a school activity; (ii) the banner "advocat[ed] the use of illegal drugs"

and Frederick was unable or unwilling to express any other credible meaning for the phrase; (iii) discouraging drug use is an important, longstanding component of the school's curriculum and is expressly incorporated into the district's student conduct policies; and (iv) the banner "was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage drug use." Pet. App. 61a-63a. The superintendent's opinion analyzed in detail this Court's student speech doctrine as articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Applying that body of law, Superintendent Bader concluded that Principal Morse's discipline of Frederick was consistent with controlling authority. Pet. App. 60a-62a.

Second, the superintendent determined that Frederick ran afoul of the school policy on truancy when he skipped class. Pet. App. 64a. Mr. Bader nonetheless noted that this unexcused absence, standing alone, likely would not have led to suspension. Pet. App. 67a. *Third*, the superintendent found that Frederick exhibited a "belligerent attitude" and "defiant" and "disruptive" behavior when he "set his own conditions for compliance" with Principal Morse's directive to accompany her to her office. Pet. App. 64a-65a. *Fourth*, he agreed that Frederick was uncooperative and evasive when the principal attempted to gather facts about the banner incident, but opined that great weight would not be placed on that particular infraction. Pet. App. 65a-66a. *Fifth*, Superintendent Bader found that Frederick refused to respond to a staff directive by withholding the banner when Principal Morse asked him to surrender it. *Id.*

The superintendent observed, *finally*, that Frederick "has a history of defiant behavior and has been suspended from

school for defiance before." *Id.* Mr. Bader concluded that Frederick's conduct warranted discipline and that the suspension was justified. Pet. App. 67a. In treating certain infractions with lenience, however, Superintendent Bader reduced Frederick's suspension to eight days. *Id.*

2. Frederick appealed to the School Board. Pet. App. 26a. Following a lengthy hearing with both witness testimony and legal argument, the School Board unanimously upheld the superintendent's decision. Pet. App. 26a, 69a.

3. Frederick filed a § 1983 action in the United States District Court for the District of Alaska. Frederick's complaint alleged that Principal Morse and the Juneau School Board violated his free speech rights under both the First Amendment and the Alaska Constitution. J.A. 12-13. Frederick sought injunctive relief, as well as compensatory and punitive damages. J.A. 13. He claimed that the seizure of the banner and subsequent disciplinary actions caused him "emotional distress, humiliation, loss of enjoyment of life, and mental anguish." J.A. 12.

On May 27, 2003, Chief Judge John W. Sedwick granted summary judgment in favor of petitioners. Pet. App. 23a-40a; *see also* Pet. App. 41a-42a. Shortly thereafter, on May 30, 2003, the court entered judgment dismissing the action. Pet. App. 43a-44a. In a detailed opinion, Chief Judge Sedwick concluded that the Juneau school officials did not in any fashion violate Frederick's First Amendment rights. From the outset, the district court emphasized that Frederick's complaint involved a student speech case:

> [T]here is no issue of fact as to whether or not this was a school-sponsored activity. . . . [Principal Morse] authorized the teachers to take their classes to view the relay. . . . [T]eachers and administrative officials monitored students' actions. . . . The relay occurred during school

> hours, at a time when parents expected their children to be under school supervision.
>
> . . . [T]he fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity.

Pet. App. 34a-35a.

Having determined that Frederick was a student subject to the school's authority during school hours, the court reasoned that the banner's message could be constitutionally prohibited under this Court's decision in *Fraser*, 478 U.S. 675. Pet. App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." Pet. App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse prevention" and thus interfered with the school's educational mission to deter illegal drug use. Pet. App. 35a-36a. The court highlighted readings of *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. Pet. App. 36a.

The district court further observed that *Tinker*, 393 U.S. 503, justified Principal Morse's actions. Pet. App. 35a-36a. In the trial court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." Pet. App. 36a. Underlying the district court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. Pet. App. 33a-38a.

Finally, the district court concluded, under both this Court's precedents and Alaska law, that petitioners were immune from claims for money damages. Pet. App. 27a-32a. The court noted that (i) no case law was on point to establish that Principal Morse's actions were unconstitutional; (ii) the cases cited by Frederick were all readily distinguishable; and (iii) Principal Morse's actions were not "so far-fetched as to make the illegality apparent." Pet. App. 27a-30a. Quite the contrary, the trial court observed that existing case law "shows that it was objectively reasonable for defendants to believe that their actions were proper." Pet. App. 28a.

4. The Ninth Circuit reversed. The court of appeals acknowledged that the banner incident occurred while "Frederick was a student, and school was in session." Pet. App. 6a-7a. Accordingly, in the Ninth Circuit's view, this case was not about "speech on a public sidewalk." Pet. App. 5a. To the contrary, this Court's student speech doctrine under *Tinker*, Fraser, and *Kuhlmeier* fully applied. Pet. App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HiTS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." Pet. App. 6a-7a.

The panel ruled, however, that the district court incorrectly applied *Fraser*'s "plainly offensive" standard. The court narrowly interpreted *Fraser* as allowing only prohibitions on student speech of a "sexual nature." Pet. App. 9a. Applying that circumscribed standard, the court concluded: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the school district's policy of suppressing pro-drug messages was, on the other hand, just one of any number of "social message[s] contrary to the one favored by the school." That being so, in the Ninth Circuit's view, a school district is "not

entitled to suppress speech that undermines whatever mission it defines for itself." Pet. App. 7a, 12a.

The court of appeals further determined that *Kuhlmeier*, which acknowledged schools' ability to regulate the content of school-sponsored speech, 484 U.S. at 273, was inapplicable. Pet. App. 10a-11a. The panel noted that, here, Frederick displayed the banner off school property, in what the court characterized as a "non-curricular activity" that was only "partially supervised."[3] Pet. App. 10a-11a, 17a. Thus, even though characterizing the relay as a "school authorized" activity, Pet. App. 7a, the court below did not view the banner as speech that was either sponsored or endorsed by the school. Pet. App. 10a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the analysis, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that watershed decision, the court of appeals opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." Pet. App. 12a. The panel concluded that petitioners could not demonstrate the requisite element of

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[3] The Ninth Circuit did not identify any error in the district court's findings that teachers and administrators monitored and supervised students during the torch relay event. The court of appeals, however, described the event as "partially supervised" based on affidavits from a few of Frederick's friends who claimed that some of the 1,000-plus Juneau-Douglas High School students left the event or were otherwise unruly. Pet. App. 2a, 17a; J.A. 32, 36-38. As the district court observed, these student affidavits did not contradict evidence presented by the school district that set forth in detail the supervisory roles of administrators and teachers. Pet. App. 34a; *see* J.A. 23-24, 47-56. Notwithstanding the Ninth Circuit's circumlocution, it is undeniable that there was official school supervision at the relay event.

"disruption." In consequence, as the Ninth Circuit saw it, petitioners had violated Frederick's First Amendment rights. Pet. App. 18a.

The court of appeals further concluded that Principal Morse was not entitled to qualified immunity. In the panel's view, the case law "succinctly explained how to apply the various Supreme Court doctrines . . . , thus ensuring that opacity in this particular corner of the law has been all but banished." Pet. App. 20a. Having found a constitutional violation, the Ninth Circuit determined that Principal Morse violated Frederick's "clearly established rights." *Id.* The panel thus vacated the district court's judgment and remanded to determine Frederick's monetary damages. Pet. App. 22a.

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. Pet. App. 45a-46a. On August 28, 2006, the Juneau School Board and Ms. Morse filed a Petition for a Writ of Certiorari in this Court. On December 1, 2006, the Court granted the petition.

SUMMARY OF ARGUMENT

In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit embraced an unduly narrow reading of this Court's teachings with respect to the free speech rights of public school students. To make very bad matters profoundly worse, the court below fashioned an approach to qualified immunity doctrine that conflicts with this Court's precedents and is dangerously unsettling to thousands of public school educators and administrators across the country. The Ninth Circuit was doubly wrong.

In its teachings with respect to student speech principles, this Court has consistently recognized that public educational institutions possess "special characteristics" that profoundly shape the contextually-sensitive contours of Free Speech

doctrine. From its watershed decision in *Tinker*, 393 U.S. 503, through its subsequent decisions in *Fraser*, 478 U.S. 675, and *Kuhlmeier*, 484 U.S. 260, this Court has both protected nondisruptive political speech by students, while respectfully deferring to school administrators' judgments in cabining expression that is inconsistent with the educational function of public schools.

In its First Amendment analysis, the Ninth Circuit fundamentally misconceived the nature and scope of the mission of public education in this country—as elucidated by this Court in both *Fraser* and *Kuhlmeier*—and, at the same time, wildly enlarged the ambit of purportedly political speech. In doing so, the court of appeals substituted its unforgivingly libertarian worldview for the considered judgment of school officials (and school boards) in seeking, consistent with Congress' statutory mandate, to foster and encourage a drug-free student lifestyle. Frederick's banner display not only radically changed the subject from the Olympic Torch Relay ceremony to illegality-promoting, distracting banter, his message itself lay far outside the province of *Tinker*-protected political expression.

To the contrary, as Chief Judge Sedwick rightly concluded, the banner's ambiguous but obtrusive message fell comfortably within the ambit of *Fraser*'s focus on promoting appropriate norms of discourse and civility. *Kuhlmeier* likewise supports the school authorities' decision to just say no to respondent's whimsically drug-focused message, inasmuch as the banner—if left undisturbed—could have told not only the high school student body but the larger community that drug-use promotion is openly tolerated within the local public high school. Nothing in law or logic, much less common sense, requires such an extravagant result.

The Ninth Circuit also strayed from this Court's qualified immunity jurisprudence, as embodied in decisions such as

Saucier v. Katz, 533 U.S. 194 (2001). The court of appeals' conclusion that Deborah Morse, a paradigmatic conscientious educator and administrator, should face a potentially ruinous award for money damages, by virtue of her enforcement actions directed against respondent, cries out for the Court's muscular disapprobation.

As a threshold matter, for reasons already adumbrated, the court of appeals fell into error as a matter of substantive First Amendment law. With that foundation removed, the edifice of potential personal liability for money damages entirely collapses. Even assuming arguendo, however, that Principal Morse was in constitutional error in enforcing the School Board's anti-drug-message policies, the Ninth Circuit was still mistaken in its articulation and application of qualified immunity principles. Under this Court's objective test, immunity doctrine provides a shield from civil damages suits unless "it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Principal Morse abundantly satisfies that objective standard. Responsible for maintaining order and proper decorum at a celebratory gathering of more than 1,000 high school students, the principal was confronted with a flagrant, inherently disruptive violation of a written school policy proscribing pro-illegal-drug messages. She responsibly took the appropriate action to ensure that the Olympic Torch Relay event was not further disrupted by Frederick's pro-drug banner. Nor does the fact that Frederick was not physically on school grounds at the time of the banner display exempt him from school discipline. At the pivotal moment when engaging in his expressive conduct, Frederick was a student participating in a school activity during school hours. A reasonable principal could well have believed that enforcing a well-established policy against promoting illegal

substances at a non-classroom school activity was entirely lawful, and indeed required by School Board mandate. By doing so, the principal acted entirely reasonably. Accordingly, her conduct should, under this Court's body of qualified immunity jurisprudence, be fully immunized from judicial condemnation.

ARGUMENT

Under challenge to address declining academic performance in the age of globalization, American public education finds itself—even at a time of war—as a vitally important subject in the unfolding democratic conversation about the Nation's future. The Ninth Circuit's destabilizing decision in this sensitive arena renders all the more daunting the vital task of teachers, administrators, and volunteer school board members in attending holistically to the needs of millions of students entrusted every school day to their charge. In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit has dramatically altered the legal landscape of public education law in the United States. As to both the First Amendment and the law of qualified immunity, the court of appeals' uncompromisingly libertarian vision is deeply unsettling to public school educators across the country. The decision below is doubly—and dangerously—wrong. The judgment should be reversed.

I. THE JUNEAU SCHOOL OFFICIALS DID NOT VIOLATE FREDERICK'S FIRST AMENDMENT RIGHTS WHEN THEY DISCIPLINED HIM FOR VIOLATING SCHOOL POLICIES AGAINST PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL ACTIVITY.

A. The "special characteristics" of the school setting require deference for school officials' actions.

Throughout the fifty States (and the District of Columbia), public education serves what this Court long ago described as "a principal instrument in awakening the child to cultural values." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Through government-operated educational institutions, large and small, the vast majority of young Americans are prepared "for later professional training" and for "adjust[ing] normally to [their] environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown*, 347 U.S. at 493). Those who serve as teachers and administrators in this challenging environment are tasked with a weighty and delicate responsibility. In prescribing and controlling student conduct, public educators are inexorably required to balance students' constitutionally-guaranteed liberties with the bedrock duty to educate young minds, including fashioning "the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. Pursuit of these goals inevitably requires authorities to regulate speech, symbolic and otherwise, in a manner impermissible outside the school setting. *Id.* at 682; *accord Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding high school's random suspicionless drug testing policy); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permitting random drug testing of high school student athletes).

In the First Amendment context, this Court has long emphasized that the rights of students in the public schools "are not automatically coextensive with the rights of adults in

other settings." *Fraser*, 478 U.S. at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-342 (1985)). Thus, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," students' rights must be "applied in light of the *special characteristics* of the school environment." *Tinker*, 393 U.S. at 506 (emphasis added). The "uninhibited, robust, and wide-open" free speech in adult discourse, as ordained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), is manifestly different from the latitude accorded to schoolchildren in a "custodial and tutelary" environment. *Vernonia*, 515 U.S. at 655.[4]

As this Court has acknowledged on numerous occasions, the resolution of conflicts arising in the daily operation of school systems "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citations omitted). Only when a decision to censor student expression has no valid educational purpose is the First Amendment so "*directly and sharply implicate[d]*" as to require judicial intervention to protect students' constitutional rights. *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Thus, in discerning the proper doctrinal limitations upon the

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[4] So staunch a defender of the "marketplace of ideas" as John Stuart Mill saw this delineation in his theories on individual liberty:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

John Stuart Mill, *On Liberty* 69 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

baseline liberty guaranteed by the Free Speech Clause, a guiding principle unifying this Court's teachings is that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Id.* at 266 (citing *Fraser*, 478 U.S. at 685). Firmly embedded in this Court's student speech jurisprudence, that overarching principle is the beginning and end of this case.

1. *Tinker* protects speech that does not intrude upon the work of the schools.

The framework for student speech doctrine begins with *Tinker*. In that landmark case, the Court upheld the free speech rights of three students to wear anti-war armbands during the school day as a silent, passive political protest. 393 U.S. at 514. The Court reasoned that wearing black armbands, a traditional sign of mourning, was expressive conduct akin to pure speech, which is entitled to comprehensive protection. *Id.* at 505-06. At the same time, the *Tinker* majority recognized the unique characteristics of a public school and the unavoidable reality that administrators and teachers may suppress student speech, whether in class or out of it, that "intrudes upon the work of the schools or the rights of other students." *Id.* at 508. In the record before it, however, the Court could discern no evidence that the passive wearing of two-inch armbands disrupted school operations. *Id.*[5]

The *Tinker* Court had no occasion to spell out in detail the extent or nature of "disruption" necessary to trigger a

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[5] Justice Fortas' majority opinion described student reaction to the armbands as provoking "no threats or acts of violence" other than a "few . . . hostile remarks." *Id.* at 508. In dissent, Justice Black found, to the contrary, that the evidence did support a finding of disruption, namely, that, in addition to hostile comments, student attention was diverted in classrooms. *Id.* at 517-18 (Black, J., dissenting).

school's authority to curtail student speech. The Court described the requisite disruption as "interference, actual or nascent, with the schools' work," which is something more than "undifferentiated fear or apprehension of disturbance." *Id.* Under this standard, if a school administrator reasonably perceives (or forecasts) that a student's expressive conduct is presently interfering (or would eventually interfere) with the school's work, then the administrator is warranted in suppressing the particular expression (or expressive conduct). *Id.* Student speech rising to this level of disruption may occur "in class or out of it" and may "stem[] from time, place, or type of behavior." *Id.* at 513. The Court provided further guidance by distinguishing John Tinker's silent, passive conduct from the disciplinary problems posed by "aggressive, disruptive action or even group demonstrations." *Id.* at 507-08. The *Tinker* Court thus foreshadowed its willingness to approve school intervention when speech is accompanied by antisocial conduct.

Justice Black dissented. He lamented that the broad sweep of the majority decision invited students to "use the schools at their whim as a platform" and that courts, rather than schools, "will allocate to themselves the function of deciding how the pupils' school day will be spent." *Id.* at 517 (Black, J., dissenting). Although his opinion failed to carry the day, Justice Black's plain-spoken words continue to echo through the body of student speech law.

2. *Fraser* permits schools to prohibit student speech that undermines the basic educational mission.

Fraser—the second stage of the student speech decisional trilogy—assured school officials that they retain authority to proscribe student speech that is vulgar, lewd, indecent, obscene, or plainly offensive, even absent a showing of material and substantial disruption to school discipline. 478 U.S. at 683-84. Drawing from *Tinker*, the

Fraser Court emphasized that inculcating habits and manners of civility—through discouraging offensive language—is "truly the 'work of the schools.'" *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508). To force a school to tolerate indecorous student speech, wrote Chief Justice Burger, "would undermine the school's basic educational mission." *Id.* at 685.

Applying this principle, the *Fraser* Court reversed the Ninth Circuit's contrary judgment and upheld a public high school's disciplining a student for delivering a sexually suggestive nominating speech for a student government candidate at a voluntary school assembly. *Id.* That speech referred to the candidate in terms of "an elaborate, graphic, and explicit sexual metaphor," though the speaker's saucy presentation employed neither profanity nor obscenity. *Id.* at 677-78. Under the circumstances, the Court determined that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. On that note, the Court embraced Justice Black's broad teaching in *Tinker* that "the Federal Constitution [does not] compel[] . . . teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Emphasizing that not all types of speech are accorded identical protection, particularly in view of the "special characteristics" of the educational setting, the *Fraser* Court recognized "the marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Matthew Fraser's] speech." *Id.* at 680. The Court acknowledged that some speech is properly subject to age-appropriate restrictions: "[Fraser's sexually explicit] speech could well be seriously damaging to its less mature audience,

many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683.[6] In that regard, the *Fraser* Court echoed Justice Stewart's concurrence in *Tinker*, where the Justice from Cincinnati articulated the view that "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (quoting *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result). Significantly for First Amendment analysis, Fraser's ribald electioneering pronouncements fell well below the standards for "obscenity" established in adult contexts. *See, e.g., Miller v. California*, 413 U.S. 15 (1973). The bedrock point from *Tinker* remained: The public education setting has "special characteristics" profoundly informing First Amendment analysis.

Justice Brennan concurred in the judgment. He agreed that, "under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission." *Fraser*, 478 U.S. at 688-89 (Brennan, J., concurring). In dissent, Justice Stevens similarly recognized the appropriateness of disciplining students for expressive conduct that conflicts with a school's educational mission. *Id.* at 691 (Stevens, J., dissenting). He opined that "a school faculty must regulate the content as

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[6] The rationale for giving due consideration to age appropriateness is rooted in the responsibilities of school authorities acting *in loco parentis*—parents may legitimately expect schools acting on their behalf to protect their children "from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684.

well as the style of student speech in carrying out its educational mission." *Id.* (Stevens, J., dissenting).[7]

3. *Kuhlmeier* allows student speech restrictions in school-sponsored activities when pursuant to legitimate pedagogical concerns.

Fraser's deferential approach to school officials' First Amendment calibrations was likewise embraced in *Kuhlmeier*. In this final stage of the Court's school speech trilogy, the Court acknowledged that school officials are entitled to exercise pervasive control over the style and content of student speech that reasonably might be perceived to bear the school's imprimatur. 484 U.S. at 273. Regulation of speech viewed as "school-sponsored"—on account of the school lending its name and resources to the activity—is permitted if the curtailment is reasonably related to "legitimate pedagogical concerns." *Id.* Thus, in *Kuhlmeier*, a school properly exercised its discretion in refusing to publish certain student articles on pregnancy and divorce in a school-funded student newspaper. *Id.* at 276. The Court concluded that suppression of the articles was reasonably related to the tripartite school objectives of (i) protecting the privacy of the individuals referenced in the articles; (ii) shielding younger students from inappropriate subject matter; and (iii) teaching journalistic fairness. *Id.*

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[7] Despite agreeing that Fraser's speech was inappropriate in certain school settings, Justice Stevens dissented on the grounds that Fraser's punishment under the school policy at issue did not comport with the Due Process Clause of the Fourteenth Amendment. *Id.* at 696 (Stevens, J., dissenting). Here, by contrast, Frederick's complaint advances no procedural due process claim. J.A. 8-13. Nor could it reasonably have done so. Frederick's free speech claim received lavishly elaborate treatment from both the Superintendent, Gary Bader, and the School Board. In addition, Frederick does not challenge the facial validity of the Juneau School Board policies. Pet. App. 7a.

The *Kuhlmeier* Court added that "[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use." 484 U.S. at 272. Alluding to *Fraser*'s emphasis on upholding schools' "educational mission," the majority recognized that promoting illegal substances was "inconsistent with 'the shared values of a civilized social order.'" *Id.* (quoting *Fraser*, 478 U.S. at 683). Thus, the Court left no doubt that discouraging illegal substance use reflected a legitimate pedagogical concern.

B. The *Tinker-Fraser-Kuhlmeier* trilogy permitted Juneau school officials to discipline Frederick for promoting illegal substances.

The case at hand fits comfortably within the framework of the school speech trilogy. In sharp contrast to Tinker's anti-war armband, Frederick's "bong hits" banner did not involve the passive expression of a political viewpoint. Rather, his slang marijuana reference was part of an antisocial publicity stunt designed to draw attention away from an important (and historic) school activity. The message that Principal Morse, Superintendent Bader, the unanimous School Board, and Chief Judge Sedwick all reasonably gleaned from this banner—and on which the Ninth Circuit proceeded—was that it expressed a positive sentiment about marijuana use. Frederick cannot reasonably contend otherwise. The message was therefore directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle (as expressed in written School Board policies). In the context of a school-sponsored activity, Principal Morse's restriction of this expression was indisputably consistent with an important pedagogical concern. The trilogy—when distilled to its essential principles—stands for the proposition that students have limited free speech rights balanced against the School District's right to carry out its educational mission and to

maintain discipline. Under this body of law, Frederick's claim to First Amendment protection falls woefully short.

1. Discouraging use of illegal substances is an undeniably important educational mission.

Preventing teenage drug use is a critical educational mission of our public schools. "That the nature of the concern is important—indeed perhaps compelling—can hardly be doubted." *Vernonia*, 515 U.S. at 661; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 599 (2001) (Souter, J., concurring in part and dissenting in part) ("[F]ew interests are more 'compelling,' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance . . . ."). While drug abuse remains a serious problem with adults, the severity is even more pronounced with elementary and secondary schoolchildren:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.

Vernonia, 515 U.S. at 661-62 (internal citations and quotation marks omitted). Troublingly, "[t]he drug abuse problem among our Nation's youth . . . has only grown worse" in recent years, thus "mak[ing] the war against drugs a pressing concern in every school." *Earls*, 536 U.S. at 834.

In view of this flinty reality, this Court has determined that "'special needs' . . . exist in the public school context" to justify overriding Fourth Amendment privacy interests that would otherwise apply outside the school setting. *Id.* at 843; *Vernonia*, 515 U.S. at 653. Accordingly, the majorities in *Earls* and *Vernonia* upheld random drug testing of students participating in extracurricular activities. 536 U.S. at 837-38; 515 U.S. at 664-65. These precedents once again confirmed that constitutional protections for schoolchildren are inexorably informed (and frequently diluted) by "the *special characteristics* of the school environment." *Tinker*, 393 U.S. at 506 (emphasis added).

Student free speech rights likewise appropriately yield when it comes to promoting illegal substances. "[T]he single most important factor leading schoolchildren to take drugs . . . [is] peer pressure." *Earls*, 536 U.S. at 840 (Breyer, J., concurring). Impressionable adolescents face strong inducements to use drugs as they are bombarded with pro-drug messages from classmates, adults, and the media. Remaining steadfastly consistent with the drug-free-lifestyle message is therefore particularly important while school is in session. Congress recognized this fact in passing the comprehensive Safe and Drug Free Schools and Communities Act, which supports local schools' drug prevention efforts and requires consistency of message that illegal drugs are "wrong and harmful." 20 U.S.C. § 7114(d)(6).

Consistent with Congress' mandate, thousands of local school boards across the country, much like Juneau's, have addressed the drug problem by crafting policies related to drug-abuse prevention, intervention, treatment, and discipline. Pet. at 17-21. These policies are adopted by duly-elected school board members through a public, deliberative process. The Juneau School Board, for example, is required by statute to develop and periodically review its policies

governing student rights and responsibilities. Alaska Admin. Code tit. 4, § 07.010. These student conduct rules must substantively and procedurally comply with applicable laws and regulations. *Id.* Through this exercise in constitutional self-government, a common prohibatory theme has emerged: Messages promoting illegal substances are not to be tolerated during school or any school activities. *See* Pet. App. 52a-58a (various anti-drug-message policies adopted in 1985, as revised).

Not surprisingly, lower courts addressing First Amendment challenges to anti-drug school policies had reached a bottom-line consensus—at least prior to *Frederick*. Several courts had recognized that prohibitions on pro-drug messages are constitutional because such expression is "plainly offensive" under *Fraser* and inconsistent with the mission of schools to promote healthy lifestyles (including by seeking at every turn to combat substance abuse). *See, e.g.*, *Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use);[8] *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987)

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[8] Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

(upholding prohibition of t-shirt depicting drunken administrators under *Fraser*, noting that schools have a duty to teach about harmful effects of alcohol).

Other courts have observed that there can be little dispute that messages promoting illegal substances cause disruption within schools. *See Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980) (taking judicial notice that messages promoting drug use endanger students' health and safety; prohibiting distribution of underground newspaper containing drug paraphernalia advertisements); *cf. McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21 (W.D. Okla. 1992) ("Reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol and that its consumption by minors is illegal and/or would substantially disrupt or materially interfere with school discipline.").

Still other courts have upheld bans on pro-drug messages in the context of school-sponsored activities. *See Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (permitting school policy banning ads in school publications for tobacco and liquor products); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999) (upholding prohibition against school band playing song "White Rabbit" because it might "reasonably be perceived" to advocate the use of illegal drugs).

More broadly, discouraging drug use has been universally recognized and sanctioned by school boards, legislatures, and

courts (including this Court) as a permissible educational goal.[9] The *Frederick* decision appears to be the first case in American jurisprudence in which any court—federal or state—has stripped public school officials of authority to proscribe pro-drug messages.[10] This Court should remove any lingering doubt whether school authorities, pursuant to their basic educational mission, retain discretion to restrict student speech that is reasonably viewed as promoting or advocating the use of substances that are illegal to minors.

2. Frederick's pro-drug banner interfered with decorum by radically changing the focus of a school activity.

The *Fraser*-ordained value of preserving decorum in schools likewise stands as a permissible justification for

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[9] Courts have found sufficient justification in promoting temperance of minors that a State may regulate the placement of alcohol advertisements in public. In *Anheuser-Busch, Inc. v. Schmoke*, for example, the Fourth Circuit upheld Baltimore's ordinance banning outdoor alcohol advertising in certain areas where children are likely to walk to school or play in their neighborhood. 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). What a strange dichotomy if governmental entities, as sovereigns, are allowed to restrict commercial alcohol advertising, but schools, despite their "special characteristics," are required to tolerate the very same messages.

[10] We recognize that the Ninth Circuit's pioneering approach in *Frederick* is not without judicial admirers elsewhere. In *Guiles v. Marineau*, decided two days after the filing of the petition for certiorari in this case, the Second Circuit applied *Frederick* in holding that school authorities could not censor images of liquor bottles and cocaine on a student's t-shirt. 461 F.3d 320, 331 (2d Cir. 2006), *petition for cert. filed*, No. 06-757 (U.S. Nov. 28, 2006). The student's t-shirt contained what the Second Circuit deemed an "anti-drug message," which, in the court's view, could not be construed as "offensive" under *Fraser*. *Id.* at 329.

restricting student speech and for which school authorities traditionally are accorded wide discretionary latitude. *See Fraser*, 478 U.S. at 686 ("[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." (quoting *T.L.O.*, 469 U.S. at 340)).[11] Discipline stemming from the time, place, or manner of a student's expressive conduct in no wise offends the First Amendment when the school has an interest in ensuring that school activities "proceed in an orderly manner." *Fraser*, 478 U.S. at 689 (Brennan, J., concurring in judgment); *cf. Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (recognizing that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.").

Here, Frederick's "bong hits" banner substantially interfered with a school-sanctioned activity. J.A. 43, Pet. App. 62a. The Olympic Torch Relay was an important community event:

> "The arrival of the torch in Juneau is cause for celebration," Gov. Tony Knowles said, "and I urge all Alaskans to embrace the state goal of the Olympic movement—to build a peaceful and better world by educating young people through sport, without discrimination, in the spirit of

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[11] *Cf. Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) ("I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("[A] reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system."), *cited with approval in Tinker*, 393 U.S. at 509.

> friendship, solidarity, fair play and mutual understanding."

See Bingham, *supra*. At the culminating moment in his high school's welcoming the Olympic Torch Relay, Frederick radically changed the subject. By dividing the audience's attention—and distracting from the purpose that the Juneau School District sought to serve in sanctioning this event—Frederick's expressive conduct warranted the school's uncompromising censure. His message was trebly wrong. It was the wrong message, at the wrong time, and in the wrong place. [12]

3. Principal Morse properly disassociated the school from Frederick's pro-drug banner.

Fraser, in short, closely fits the facts at hand. But so does the third member of the Court's school speech trilogy. The Ninth Circuit deemed *Kuhlmeier* inapplicable because the school neither sponsored nor endorsed Frederick's

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[12] *Cf. Fraser*, 478 U.S. at 691 n.1 (Stevens, J., dissenting) ("Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" (quoting *Consol. Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring in judgment))). In the context of extra-curricular school activities (with students assembled before the community), administrators are frequently called upon to maintain order. In this situation, the fundamental role of educators to inculcate "habits and manners of civility" and encourage "socially appropriate behavior," *id.* at 681, seamlessly extends to guiding the demeanor of a student audience. In the interest of teaching students to be courteous spectators, an administrator should enjoy sufficiently broad authority to fulfill this duty without suffering federal judicial condemnation (and a potential money damages award to boot).

banner. Pet. App. 10a-11a.[13] This dismissive conclusion underappreciated *Kuhlmeier*'s logical reach.

Frederick's banner was unfurled in the midst of a highly important "school-sponsored" activity. Pet. App. 34a. By lending its resources to the event and sanctioning student observance during school hours, the School District unwittingly provided Frederick a bully pulpit for his publicity stunt. Frederick's "speech" was not expression in a classroom or hallway. To the contrary, he was situated outside the school with virtually the entire student body watching. At the very moment the school's involvement in the torch relay was at its zenith, Frederick lofted his 14-foot, subject-altering banner for the community (and the world) to see.

To be sure, reasonable observers might have concluded that the banner's message was so inimical to the school's mission that it did not bear the school's imprimatur. But this could be said of a student who pens a pro-drug article for a school-sponsored newspaper. *Kuhlmeier*'s framework still would apply in the latter situation, and thus censoring such an article would be entirely permissible. *See* 484 U.S. at 272 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ."). If Ms. Morse had been insouciantly indifferent to Frederick's drug-related banner, many in the community might well have wondered what they are teaching at taxpayer-supported Juneau-Douglas High

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[13] For his part, Chief Judge Sedwick did not directly address *Kuhlmeier*'s applicability, though he did aver that Principal Morse rightly removed the banner "so as not to place the imprimatur of school approval on the message." Pet. App. 37a (citing *McCann*, 50 F. Supp.2d at 924 (relying on *Kuhlmeier* to uphold prohibition of school band playing or a pro-drug song)).

School. The principal, accordingly, had a powerful pedagogical concern in prohibiting such a mission-compromising expression. Similarly, under *Fraser*, Principal Morse properly determined that it was her responsibility to "disassociate" the school from the banner's pro-drug message, which undermined the school's health and safety educational mission. 478 U.S. at 685-86.

C. Frederick was subject to school disciplinary rules.

As a student attending a school activity during school hours, Frederick was indisputably under the school's authority. He was standing with the assembled student body, which, as permitted by the administration, had lined both sides of Glacier Avenue directly in front of the school. J.A. 23-24.

Under these circumstances, the School Board's policies and student handbook left no doubt that Frederick was subject to school disciplinary authority: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (defining infractions as including those committed "at school sponsored/sanctioned functions or activities"). The Juneau School District's rules were consistent with common practice and established law. *See generally* 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006) ("Authority to discipline students for school related activities extends not only to those occurring on school property but also off school property.").

Based on his findings, Chief Judge Sedwick determined "there is no issue of fact as to whether or not this was a school-sponsored activity." Pet. App. 34a. The Ninth Circuit likewise concluded, simply but decisively: This is a "student speech case," not a "speech on a public sidewalk" case. Pet.

App. 5a. Frederick's claim that he was somehow "speaking" in a Jeffersonian public square is entirely refuted by the facts as determined by the two lower courts. And in that school-related context, with its "special characteristics," Frederick was not at liberty to praise, however whimsically, the drug culture and thereby radically change the subject that had brought the student body to that time and place. The First Amendment does not reach nearly so far.

II. PRINCIPAL MORSE WAS ENTITLED TO QUALIFIED IMMUNITY IN ENFORCING A FACIALLY VALID STUDENT CONDUCT POLICY.

A. The hallmark of qualified immunity is the objective legal reasonableness of the official's act under law clearly established at the time of the act.

Under well-settled principles, qualified immunity shields government actors from personal liability and suit arising out of their official actions in all but the most exceptional cases. Only where conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known" will a court allow government officials to be sued in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Under this objective test, a court may not deny immunity simply because a government actor's conduct was ultimately deemed unlawful. *Id.* Even where public officers run afoul of constitutional norms, immunity provides a vital shield from civil damages lawsuits unless "it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley*, 475 U.S. at 341. "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, then "immunity should be recognized." *Id.*

The profoundly important, oft-recognized purpose of the immunity shield is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Harlow*, 457 U.S. at 818). In America's litigious culture, the looming threat of personal liability for discretionary acts would deeply disincentivize the full and faithful exercise of governmental authority. *Harlow*, 457 U.S. at 806. The unhappy result is that the community as a whole would pay a heavy price:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see Wood v. Strickland*, 420 U.S. 308, 321 (1975) (observing that qualified immunity ensures that officials do not "exercise their discretion with undue timidity"); *Scheuer v. Rhodes*, 416 U.S. 232, 241, 242 (1974) ("[P]ublic interest requires decisions and action to enforce laws for the protection of the public. . . . [I]t is better to risk some error and possible injury from such error than not to decide or act at all.").

All this is well known. In keeping with these foundational public policy considerations, qualified immunity doctrine requires that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Qualified immunity would be rendered largely meaningless if the judiciary defined the

constitutional right at issue in an overly general or abstract manner. *Saucier*, 533 U.S. at 201; *see Int'l Action Ctr. v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) ("It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been 'clearly established' in this country since 1791."). Much greater granularity is required. In this Court's formulation, the right in question must have been "'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The judiciary is thus called upon to examine with care the intensively fact-specific question whether in light of the circumstances confronting the governmental decisionmaker, a reasonable official could have believed his or her conduct was lawful. *Id.* at 641.

Wilson is instructive. There, this Court framed the pivotal issue as "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. Although unanimously concluding that the law enforcement officers had trampled upon plaintiffs' Fourth Amendment rights, the Court nevertheless determined that the officers enjoyed immunity because the right was not clearly established at the time of the incident. *Id.* The Court reasoned that (i) it was not obvious from general Fourth Amendment principles that the officers' conduct ran afoul of constitutional norms; (ii) media ride-alongs had become a common police practice; (iii) at the time of the incident, no judicial opinions had condemned the practice as unlawful (let alone any controlling authority in the relevant jurisdiction); (iv) available persuasive authority actually suggested that the practice was lawful; and (v) the officers relied on formal ride-along policies, which bolstered the reasonableness of their belief that they were acting lawfully. *Id.* at 615-17.

So too, *Anderson* underscored the specificity required for discerning a clearly established right. In that case, an FBI agent pursuing a fugitive bank robber conducted a warrantless search of an innocent citizen's home—allegedly without probable cause or exigent circumstances. This Court held that the agent could not be stripped of qualified immunity without first examining whether a reasonable agent confronted with the same factual circumstances could have believed the search was lawful. 483 U.S. at 641. To be sure, the Court emphasized, the plaintiff-citizens manifestly had a clearly established Fourth Amendment right to be free from warrantless searches unsupported by probable cause and exigent circumstances. But that was not the end of the inquiry. To the contrary, the lower courts still had to determine whether the agent's search was objectively legally unreasonable. *Id.* Under a complete immunity-focused analysis, the transgressing agent would enjoy immunity if he or she could have reasonably but mistakenly concluded that probable cause and exigent circumstances existed. *Id.* At a minimum, this Court instructed that government officials are entitled to fair and reasonable notice that specific actions are unlawful and may give rise to liability for damages. *Id.* at 646. So long as their actions are "reasonable in light of current American law," officials should be able to exercise their authority with the fundamental assurance that their actions will not subject them to a civil damages lawsuit. *Id.*

B. Principal Morse reasonably believed that she was lawfully enforcing School Board policy against promoting illegal substances.

Principal Morse abundantly satisfies the now-familiar qualified immunity inquiry. Indeed, she represents the paradigmatic conscientious public servant for whom these bedrock qualified immunity principles were designed to protect. Responsible for maintaining order over a celebratory gathering of more than 1,000 high school

students, J.A. 56, Principal Morse was confronted with a violation of a written (and non-idiosyncratic) School Board policy. When Frederick unfurled his pro-marijuana banner, an experienced educator made a reasonable, on-the-spot judgment to enforce her School Board's longstanding, commonplace rule: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors." Pet. App. 53a (Juneau Sch. Bd. Policy 5520). Ms. Morse was, in short, reasonably performing her Board-mandated duties.

By no means does the fact that Frederick was neither in the classroom nor on school grounds exempt him from school discipline. As we discussed in our First Amendment analysis, at the tell-tale moment when he unfurled his banner, Frederick was a student participating in a school activity during school hours. He was not in a Jeffersonian free speech zone. The school policies, again, spelled this out with crystalline clarity: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (student handbook discipline guidelines) (defining infractions as including those committed "at school sponsored/sanctioned functions or activities"). Principal Morse faithfully followed these policies to the letter.

The decisive qualified immunity question here is whether a reasonable principal could have believed that enforcing a policy against promoting illegal substances at a non-classroom school activity was lawful in light of clearly established law and the information at hand. The answer is emphatically yes. Neither the general principles developed in the *Tinker-Fraser-Kuhlmeier* trilogy, nor those elucidated in subsequent case law put Ms. Morse on notice that

enforcement of the Juneau School Board policies under these fact-specific circumstances would violate a "clearly established" constitutional right. To the contrary, such anti-drug-message policies have been commonplace in public school systems throughout the country for many years. *See* Pet. at 17-21 (summarizing the nationwide prevalence of school policies against promoting illegal substances). Rarely have these uniformly embraced policies been questioned or challenged. *Id.* In the handful of cases reviewing such policies, courts had reached a consensus that school officials possess authority to prohibit such messages, even absent a specific showing of substantial disruption. *See supra* pp. 28-29.

C. Longstanding policies against promoting illegal substances never have been deemed unlawful, even in the dissonant body of student speech law.

Principal Morse's reliance on facially valid, commonplace student conduct policies, like those at issue here,[14] was eminently reasonable. *Wilson* reinforces this dispositive conclusion. As we saw in our earlier discussion, the *Wilson* Court determined that it was reasonable for law enforcement officers to rely on formal ride-along policies, particularly where the law was "at best undeveloped." 526 U.S. 617.

Here, Juneau-Douglas' principal was abiding by—and enforcing—written policies reflecting the felt necessities of our time, namely that even whimsical espousals of illegal drug use have no part in the ever-challenging venue of public education. So it is that, in the context of student speech, the law likewise can fairly be characterized as undeveloped. For

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[14] Pet. App. 7A ("This is an 'as applied' challenged, not a 'facial' challenge.").

decades, courts and legal scholars have wrestled with the guiding principles deduced from *Tinker*, *Fraser*, and *Kuhlmeier*. Quite recently, the Second Circuit poignantly observed the difficulties posed by student speech doctrine: "This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." *Guiles*, 461 F.3d at 321. Not only are the voices lamenting confusion and doubt infecting the fractious body of school speech law numerous, they are robustly and ideologically diverse.[15]

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[15] *See, e.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 & n.1 (9th Cir. 2006) (Kozinski, J., dissenting) ("Reconciling *Tinker* and *Fraser* is no easy task;" acknowledging that, at the time of the incident in *Frederick*, the parameters of "plainly offensive" speech under *Fraser* were still in flux); *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (observing that many aspects of student speech law "are difficult to understand and apply"); *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1273 (11th Cir. 2000) ("[T]he fact that the district court judge found the legal landscape so unclear as to include the alternative *Fraser* holding discussed above remains strong evidence that the law was not clearly established that *Tinker* prohibited the individual defendants' actions, as opposed to the more flexible reasonableness or balancing standard of *Fraser* permitting them."); *McIntire*, 804 F. Supp. at 1426 (describing *Fraser* as "oblique at best and certainly less than clear"); *see also* Cindy Lavorato & John Saunders, *Public High School Students, T-shirts, and Free Speech: Untangling the Knots*, 209 Ed. Law Rep. 1, 1 (2006) ("As a result of the numerous applications of *Fraser*, the extent of students' free speech in public schools is more than a bit tangled."); Justin T. Peterson, Comment, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 Mich. St. L. Rev. 931, 932-33 (2005) (examining the "confusion surrounding existing Supreme Court precedent" and asserting that "neither students nor school officials understand what students' free speech rights are in the school environment"); Douglas W. Kmiec et al., *Individual Rights and the American Constitution* 574 (2004) ("[B]alanc[ing] the students' need to exercise their First Amendment rights with the school authorities' needs to maintain order to carry out their educational tasks . . . is one of the murkier areas of the Supreme

In this hazy legal atmosphere, it was abundantly reasonable for Principal Morse to defer to longstanding policies in guiding her stewardship responsibilities. Indeed, reliance on school policies is far more compelling here than the succor sought under the ride-along policies in *Wilson*. The Court viewed the policies in *Wilson* as providing law enforcement officers comfort that they were following standard, lawful procedures, 526 U.S. at 616-17, but the policies themselves were focused more on public relations considerations than on legal justification. *Id.* at 624-25 (Stevens, J., concurring in part and dissenting in part). Here, by stark contrast, the Juneau School Board had enacted policies in full accordance with guidelines promulgated by the Alaska Administrative Code, as well as in the context of a Congressional mandate requiring the District to "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." 20 U.S.C. § 7114(d)(6); Alaska Admin. Code tit. 4, § 07.010; J.A. 22, 80-99; Pet. App. 52a-58a.

In these specific circumstances, it was reasonable *a fortiori* for Principal Morse to faithfully enforce the student conduct policies. The Ninth Circuit's hurried qualified immunity analysis ignored these policies and gave her (and the Board itself) no benefit of the doubt. In view of the state of relevant law and the existence of longstanding, facially valid policies prohibiting the promotion of illegal substances

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Court's First Amendment jurisprudence."); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527, 542 (2000) ("There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern; some are quite speech-protective and follow *Tinker*'s philosophy as well as its holding, while others are very restrictive of student speech and treat *Tinker* as if it has been overruled.").

at school activities, Ms. Morse was entirely without fair notice that her actions would give rise to personal liability. That a reasonably competent school administrator could have concluded that confronting and disciplining the banner-displaying Frederick was lawful is further underscored by the *amicus curiae* support from organizations representing tens of thousands of school administrators who, like Principal Morse, operate daily on the front lines of public education. *See* Br. of *Amici Curiae* Nat'l Sch. Bds. Ass'n et al. in Supp. of Pet. at 1.

D. The Ninth Circuit departed from fundamental qualified immunity principles.

The Ninth Circuit's determination that Principal Morse was not entitled to qualified immunity stems from the error-infected manner in which it recast and applied this Court's two-part qualified immunity test from *Saucier*. In *Saucier*, the Court rejected the Ninth Circuit's qualified immunity test because it improperly fused the question whether a constitutional violation occurred with the question whether the defendant had qualified immunity. So too here. The Ninth Circuit's qualified immunity analysis in *Frederick* once again suffers from this recurring analytical flaw.

Frederick fashions a three-part test drawn from *Saucier*:

> First, we must determine whether the facts alleged show Morse's conduct violated a constitutional right. Second, we must determine whether the right was clearly established at the time of the alleged violation. Finally, we must determine whether it would be clear to a reasonable principal that her conduct was unlawful in the situation she confronted.

Pet. App. 18a-19a (citations and internal brackets and quotation marks omitted). Although this restated test would seem to contain the essential parts of an appropriate qualified

immunity analysis, the manner in which the court of appeals explained how to execute the three steps charts a perilous course that this Court should halt.

1. The court of appeals' *post-hoc* threshold inquiry steered the analysis astray.

The Ninth Circuit began its qualified immunity analysis by restating its hindsight determination that Principal Morse violated Frederick's First Amendment rights: "The first question, whether Morse's conduct violated a constitutional right, has been addressed above in detail and answered in the affirmative." Pet. App. 19a. This determination relied, in part, on case law decided after the Olympic Torch incident, as well as a case still pending appeal at that time. *See* Pet. App. 9a n.14 (citing *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)), 14a & n.32 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002)), n.33 (citing *Newsome v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)), 15a & n.38 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003)); 15a-16a n.40 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002))). Even with full consideration of this post-incident case law, the Ninth Circuit should have answered this threshold question with a resounding no. *See supra* Part I.

2. The court of appeals confused general legal propositions for a clearly established right.

Propelled by its misstep of discerning a constitutional violation, the court of appeals next determined that Frederick's right to display a large pro-marijuana banner during school hours at a school-sanctioned event was "clearly established." Pet. App. 20a. The panel conceded that there was "no Ninth Circuit authority precisely on point" and offered only that "what we do have is consistent with the above analysis." Pet. App. 12a. Spotting precedent that may be "consistent with" a certain conclusion is manifestly not

this Court's standard for determining a "clearly established right." If no precedent is on point, then there must at least be precedent discerning "a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 533 U.S. at 202-03.

That standard cannot be satisfied here. The only pre-existing, Ninth Circuit cases that the court of appeals cited in its decision were *Burch v. Barker*, 861 F2d 1149 (9th Cir. 1988), and *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992). Both cases are readily distinguishable. At all events, neither clearly establishes that Principal Morse's actions were unconstitutional. *Burch* held that an all-encompassing predistribution review policy for student publications, including for non-school-sponsored publications, was an overly broad prior restraint. 861 F.2d at 1159. This holding was expressly limited to prior restraints. *Id.* By its terms, the *Burch* rule did not "affect the ability of the school to punish students for unacceptable or disruptive conduct after it occurs." *Id.* As if more were needed, no objectionable content was involved in *Burch*. To the contrary, the school admitted that distribution of the underground newspaper at issue would have been permitted but for the pre-review noncompliance. *Id.* at 1150-51.

McMinnville, in turn, involved students who, during a teacher strike, wore various buttons festooned with the word "scab" to protest the hiring of replacement teachers. The Ninth Circuit concluded that the buttons embodied non-disruptive political speech and, therefore, that the button-displaying conduct enjoyed *Tinker*-mandated protection. 978 F.2d at 531. *McMinnville* does not remotely stand for the proposition that schools cannot prohibit messages promoting illegal substances. To the contrary, the court of appeals reaffirmed the "deferential *Fraser* standard" that "schools need not tolerate student speech that is inconsistent with the school's 'basic educational mission,'" even absent disruption

and without a showing that the speech occurred during a school-sponsored event. *Id.* at 529 (quoting *Fraser*, 478 U.S. at 685).

Turning to the law in other jurisdictions, the Ninth Circuit brushed aside the broad recognition of schools' authority to ban promotion of illegal substances. In so doing, the panel employed another backwards observation: "[T]he only times other circuit courts have held that conduct like Morse's is *not* a constitutional violation, they have done so under facts 'distinguishable in a fair way from the facts presented in the case at hand.'" Pet. App. 19a (emphasis added). This is an odd method of determining whether a public official should be afforded qualified immunity. Starting from its *post hoc*-beplagued assumption that Ms. Morse violated the Constitution, the court of appeals sought to distinguish case law that might otherwise vindicate her conduct. Whether case law supporting the constitutionality of Principal Morse's actions is "distinguishable in a fair way" may matter to the determination whether there has been a constitutional violation, but it matters little in a qualified immunity analysis.

In another doctrinal twist, the Ninth Circuit noted that Principal Morse admitted to being aware of this Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* from an "advanced school law" course that she took almost a decade before the 2002 incident. Pet. App. 20a; *see* J.A. 76-77. That misses the analytical mark. Principal Morse's subjective beliefs do not matter in a test that pivotally turns on "objective legal reasonableness." *Wilson*, 526 U.S. at 614. That has been the law for more than two decades. Indeed, in *Harlow*, this Court eliminated subjective inquiries from the qualified immunity analysis. 457 U.S. at 818. The *Harlow* Court recognized that determinations of whether a public official subjectively acted in good faith completely

undermined a court's ability readily to dismiss frivolous and costly lawsuits against government officials. *Id.* at 815-19. The Ninth Circuit's injection of a subjective inquiry into the analysis is thus woefully misguided. This is especially true since the Ninth Circuit misconceived Principal Morse's subjective understanding. She believed in good faith that she had correctly applied relevant legal principles. Both Superintendent Bader and Chief Judge Sedwick agreed with her, as did the duly-elected School Board members. This, in short, is light years away from the dismal universe of immunity-stripping constitutional violations.

3. The court of appeals abandoned the critical inquiry whether Principal Morse's actions were objectively legally unreasonable in the particular circumstances.

The Ninth Circuit turned, finally, to what it identified as the third part of its qualified immunity test. In actual fact, this portion of the analysis is what this Court requires for determining whether a right is "clearly established"—whether the unlawfulness of the scrutinized conduct would be clear to a reasonable public official in the specific circumstances at hand. *Saucier*, 533 U.S. at 202.[16] In a pivotal move, the court below turned aside from any substantive analysis under this critical step: "Once we have held that 'the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's]

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[16] The Ninth Circuit sets up this third step by purportedly quoting *Saucier*, but the attributed language appears nowhere in that decision or in any other of this Court's decisions: "The only remaining inquiry, therefore, requires that we determine whether Morse 'could . . . have reasonably but mistakenly believed that [] her conduct did not violate a clearly established constitutional right.'" Pet. App. 20a & n.59 (purportedly quoting *Saucier*, 533 U.S. at 205).

conduct.'" Pet. App. 21a (quoting *Harlow*, 457 U.S. at 818-19).

By this approach, the Ninth Circuit effectively eliminated the most important analytical step. In its proper context, the quote from *Harlow* in no way suggested that courts may avoid making a particularized finding as to what a reasonable official would conclude in the specific circumstances at hand. If any doubt remained post-*Harlow*, subsequent decisions clarified that avoiding this important analytical step constitutes error. In *Anderson*, for example, this Court reversed the Eighth Circuit for failing to consider whether a right was clearly established in the circumstances confronting the law enforcement officer: "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally reasonable." 483 U.S. at 641.

In sum, the Ninth Circuit's qualified immunity analysis in *Frederick* revives the sin condemned in *Saucier*. The court of appeals confused general propositions for a "clearly established right" and failed to make an appropriately particularized finding as to whether a reasonable principal in Ms. Morse's position would have concluded that her disciplinary actions directed at respondent were unlawful. The upshot is that a conscientious school administrator, whose on-the-spot decisionmaking was entirely upheld by the Chief Judge of Alaska's federal district court, is now saddled with the prospect of a potentially ruinous damages award. That should not be.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
ERIC W. HAGEN
KIRKLAND & ELLIS LLP
777 South Figueroa Street
34th Floor
Los Angeles, CA 90017
(213) 680-8400

Attorneys for Petitioners

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